Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

SERGEANT DAVID R. COCHRAN,
PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

**Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

## PETITION FOR WRIT OF CERTIORARI

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25 pp

## QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it affirmed the lower appellate court's determination of no plain error where (1) at trial, the prosecution inappropriately argued for a sentence of life in confinement based on the independent maximum punishments for each of the offenses of which petitioner was convicted, when generally only an appropriate *unitary* sentence may be considered and adjudged in a military court; and (2) the staff judge advocate to the convening authority, after participating in the trial as a witness for the prosecution and injecting himself into the proceedings to oppose a defense request for continuance, nevertheless prepared the statutorily required "impartial" recommendation to the convening authority, opposing the petitioner's request for clemency.

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The petitioner, Sergeant David R. Cochran, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case, issued on 28 October 1996.

## OPINIONS BELOW

The order and summary judgment of the United States Court of Appeals for the Armed Forces, reported at No. 96-1015, _MJ_ (28 October 1996), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals, *United States v. Cochran,* ACM 30714 (AFCCA 29 April 1996), is located at Appendix B.

## JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 28 October 1996. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

## STATEMENT OF THE CASE

On 6 through 9 January 1993, the appellant was tried by a general court-martial consisting of officer members. Contrary to his pleas, he was convicted of rape, sodomy and indecent acts with a child under the age of sixteen, all on divers occasions, pursuant to Articles 120, 125, and 134, Uniform Code of Military Justice (10 U.S.C. §§ 920, 925, 934) as well as desertion, pursuant to Article 85, Uniform Code of Military Justice (10 U.S.C. § 885). He was sentenced to a dishonorable discharge, total forfeiture of pay and allowances, reduction to the lowest enlisted rank, and confinement for life.

At trial, after the court-martial returned its findings of guilty, the presentencing phase of the bifurcated proceedings

commenced. During this stage of the proceedings, the prosecution argued for a sentence which includes confinement for life. The content of this argument gave rise to an issue raised before the military appellate courts and now, in part, forms the basis for this petition.

The prosecution's argument included the following:

> Now what is this worth? What is an appropriate sentence for these crimes? Well for rape, the maximum possible punishment for *one allegation* of rape, *one commission of one act of rape is life in prison, one.* Is it appropriate? You betcha. Somebody raped an eleven year old baby, you betcha life is appropriate, just for that one act . . .What is the least amount that we can give him to punish him for that one crime of rape? Twenty years. Surely, members of the court, you aren't going to give a child rapist less than twenty years for that *first act of rape* with Thana.
>
> But is that the end of it? No, members of the court, because there were more acts of rape than once (sic). Are you going to say, we are going to limit it at this one, and say there are no penalties for those additional rapes? . . . He needs to be punished not only for one act but for the second act as well . . . Based on that evidence, you know that it may have been more than twice. But let's be lenient, members of the court, let's not punish him on speculation. We know it was more than once, *let's just punish him for two offenses,* thirty years.

R. 683–684 (emphasis added).

Trial counsel continued this line of argument with all of the charges and specifications, including those relating to sodomy with a child:

> What about the other crimes, what about sodomizing that child, making her perform fellatio on him, *maximum punishment for that is twenty years. For one offense of sodomy is twenty years,* let's be lenient, members of the court, let's be lenient. Let's not give him twenty years for taking that eleven year (sic) in his home and placing his erect penis in her mouth, for one occasion let's give him five, let's be lenient. But again, you know that there were at least two, and *two five year terms for repeated acts of sodomy is appropriate.*
>
> * * *
>
> What about her, how much time can we give for that sodomy? We have to punish him for that, you can't let him off of that, five years, give him twenty for Mechelle, let's be lenient, five years, one fourth. There's nothing harsh in that sentence, members of the court, there's nothing overbearing, that is less than what would be appropriate. *But we know there* (sic) *at least two counts of that.* No we don't members of the court, we know of five times. Mechelle told you it happened in the hallway, in the bathroom, in the car, in the garage, and one other place, there were five times. Let's be lenient members of the court, let's punish him for two acts of oral sodomy. . .

R. 685 (emphasis added).

As to the charge and specifications alleging indecent acts, trial counsel argued:

> What about the indecent acts? *The maximum punishment you can impose for one specification is seven years.* We know that repeatedly he touched these children inappropriately. Are we going to

> ignore that? Is there no penalty for that because we are going (sic) sentence him for the sodomies, no we can't do that. Seven years for touching that child's vagina and saying things to her like, "I know that felt good." How much are you going to give for that? Let's be lenient, members of the court, three and a half years. What about repeated acts, three and a half years for probing that child's anus with his finger and causing pain, three and a half years.

R. 686 (emphasis added).

Trial counsel concluded by informing the members that the maximum punishment for the charge and specification of desertion "is three years" and by arguing:

> So we are at sixty eight years, members of the court, giving him every break that we can possibly give him, being as lenient as we can possibly be, sixty years. How old is this man, members of the court? He will be thirty next year, that's ninety years. Members of the court, that's life, that is life, for the crimes that he has committed, that is life.

R. 686.

The Air Force Court of Criminal Appeals had no difficulty determining that this argument was inappropriate and "very misleading." (Appendix B). A court–martial generally must determine an appropriate unitary sentence and may only be informed of the individual maximum punishments carried by each specific offense when the military judge determines this to be appropriate. *United States v. Gutierrez,* 11 MJ 122 (CMA 1981); Rule for Courts–Martial 1005. Unlike other jurisdictions, the military does not provide for sentences running consecutively or concurrently and there is no concept at military law of a sentence including confinement in excess of life. *United States v. Andade,* 32 MJ

520, 521 (ACMR 1990). Trial counsel's argument unquestionably implied that the maximum punishment for these offenses was two life sentences for rape under Article 120, UCMJ, plus the additional individual maximum punishments for the other offenses. From this, he was effectively able to argue the "lenience" of a single life sentence which the court–martial ultimately adjudged. Further, as the Air Force Court of Criminal Appeals itself pointed out, the argument mislead the members into believing that a lengthy period of sixty years confinement was the equivalent of a life sentence. (Appendix B).

Yet, the Air Force Court found that this obviously misleading argument, which provoked no objection at trial, did not rise to the level of plain error. Notably, that Court, exercising its mandate under Article 66(c), UCMJ (10 U.S.C. § 866(c)) to approve only those sentences which are "correct in law and fact," affirmed "only" so much of the sentence to confinement as provides for forty years, notwithstanding its determination that the misleading argument made by trial counsel did not provide a basis for relief as plain error. The Court of Appeals for the Armed Force summarily affirmed the decision of the Air Force Court. (Appendix A).

After trial and before taking action to approve the findings and sentence adjudged by any general court–martial, Article 60(d), UCMJ (10 U.S.C. 860(d)) provides that the convening authority "shall obtain and consider the written recommendation of his staff judge advocate or legal officer." Article 6(c), UCMJ (10 U.S.C. 806(c), in turn states:

> No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

Article 6(c) has been "broadly applied . . . in light of its well–established purpose 'to assure the accused a thoroughly fair and impartial review.'" *United States v. Lynch,* 39 MJ 223, 227–228 (CMA 1994) *citing United States v. Crunk,* 4 USCMA 290, 15 CMR 290, 293 (1954).

In the case at bar, the legal advisor to the convening authority (the Staff Judge Advocate — Colonel N. Steven Linder) providing the written recommendation required under Article 60(d) was significantly involved in the trial proceedings in a manner which the petitioner submits took him outside of his required fair and impartial role. First, he participated in an off–the–record conference pursuant to Rule for Courts–Martial 802, in which he voiced what the defense counsel characterized as "extreme opposition" to a defense request for continuance in this case. R. 6–7. Additionally, he participated as a prosecution witness, testifying that the reason why the depositions of the purported victims in this case had been videotaped was to avoid the necessity of having the children testify in front of the petitioner and to preserve the evidence. R. 562, 566. This testimony was admitted by the trial judge in order to rebut the defense implication that these depositions were videotaped to improperly "coach" the children. R. 562–563.

When the petitioner raised this issue before the Air Force Court of Criminal Appeals, that Court recognized the impropriety of the Staff Judge Advocate's involvement in the pre–trial conference in which he reportedly advocated a position on behalf of the government. (Appendix B). However, that Court found the error waived by the lack of objection and did not recognize plain error in the SJA's participation. As for Colonel Linder testifying for the prosecution, the Air Force Court found that, since his testimony did not relate to a "contested" issue, this involvement gave rise to no impropriety or error. Again, the

Court of Appeals for the Armed Forces summarily affirmed the decision of the Air Force Court.

## REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE ARMED FORCES ERRED BY AFFIRMING THE LOWER APPELLATE COURT'S DETERMINATION THAT THERE WAS NO PLAIN ERROR DESPITE THE PRESENCE OF ERRORS WHICH SERIOUSLY AFFECT THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF THE MILITARY JUSTICE SYSTEM OCCURRING BOTH DURING THE SENTENCING PHASE OF TRIAL AND THE POST–TRIAL CLEMENCY PROCESS.

The decision of the lower military appellate court, as affirmed by the Court of Appeals for the Armed Forces, clearly reflects recognition of most of the errors asserted by the petitioner and described above. The Air Force Court explicitly noted the "very misleading" character of the prosecution's sentencing argument in its invitation for the court–martial members to consider the aggregate of the maximum punishments available for each individual offense, contrary to the law in the military jurisdiction. Further, that court recognized the impropriety of the Staff Judge Advocate's involvement in the pretrial conference. However, in each instance, there was no objection by the petitioner. Absent any objection, the Air Force Court deemed the errors waived and insufficient to constitute "plain error." (Appendix B).

Plain error will lie where there is error which is obvious, substantial and prejudicial. *United States v. Fisher,* 21 MJ 327 (CMA 1986); *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The errors asserted by petitioner are obvious as evidenced by the Air Force Court of

Criminal Appeal's ready acknowledgment of error. The only error asserted which the Air Force Court did not acknowledge was error due to the Staff Judge Advocate's participation at trial as witness for the prosecution. However, the record of Colonel Linder's participation at trial as described above clearly shows that, contrary to the Air Force Court's conclusion, his rebuttal testimony for the prosecution directly refuted the defense theory of improper influence and control of the child witnesses — a major issue at trial. Thus, the Air Force Court's conclusion is clearly erroneous.

Further, the errors asserted are both "substantial" and "prejudicial," terms which are synonymous in most cases, meaning that the errors must be such as to affect the outcome of the proceedings. *Olano,* 113 S.Ct. at 117.

The highly improper sentencing argument of trial counsel constitutes substantial and prejudicial error, having an undeniable impact on the sentence as adjudged at trial which included confinement for life just as the prosecution urged. Though the Air Force Court declined to find plain error in this argument, in considering the appropriateness of the sentence to life in confinement that Court found that such a sentence was "unusually harsh" for these offenses, noting that "we could find no Air Force case in which a child sex offender has been sentenced to confinement for life." (Appendix B). What stronger indicia of substantial and prejudicial error could one ask for? In the history of documented Air Force jurisprudence, no one has *ever* been sentenced to life in confinement for crimes of the nature here involved! Based on this record, the *only* explanation for this extraordinary result is the prosecution's highly improper and misleading sentencing argument in the context of this emotionally charged trial for child sex abuse. Thus the error of allowing this argument was both substantial and prejudicial.

While it may appear that the Air Force Court's remedial action in affirming a "mere" forty year term of confinement on sentence severity grounds ameliorates this prejudice, clearly the only appropriate remedy for this obvious, substantial, and prejudicial error is a new hearing on sentence in this case. Where, as here, it is impossible to assess what sentence would have been adjudged absent prejudicial error, only a rehearing is the appropriate remedy. *United States v. Sales,* 22 MJ 305, 307 (CMA 1986); *see also United States v. Suzuki,* 20 MJ 248, 249 (CMA 1985)(military service appellate courts use of Article 66, UCMJ sentence relief powers to remedy prejudicial legal error cannot be reconciled with requirement under Articles 51 and 52 UCMJ [10 U.S.C. §§ 851, 852] that findings and sentence be rendered by the court–martial; pertinent question upon determination of prejudicial error is, "What sentence would *the court–martial* have adjudged absent the error?" while sentence reassessment under Article 66 involves the question, "What sentence do we, as *the appellate court,* believe is appropriate based on the law and the facts?")

The errors associated with the Staff Judge Advocate's improper involvement and consequential disqualification from preparing the required fair and impartial review for consideration by the convening authority is no less substantial, no less prejudicial. Despite the extraordinary outcome in this case including the adjudged sentence to life in confinement, the Staff Judge Advocate recommended against granting clemency and no clemency was granted by the convening authority. This was true despite the petitioner's submission of matters demonstrating the disproportionate severity of the adjudged sentence in this case relative to similar cases in the military jurisdiction, the very basis on which the Air Force Court would later grant sentence relief. Allied Papers. The substantial and prejudicial error due to the lack of a truly fair and impartial review is again apparent.

Additionally, we must realize the unique importance of the Staff Judge Advocate's review and the process for post–trial clemency within the military justice system. The Court of Appeals for the Armed Forces has often described the impartial review by a legal officer as a "right" afforded the military accused. *See United States v. Gordon,* 1 USCMA 255, 2 CMR 161, 168 (1952)("the right to an impartial review is an important right which must be recognized in the military justice system and an accused is entitled to have the record reviewed and the limits of his sentence fixed by one who is free from any connection in controversy"). Further, it is frequently acknowledged that a military accused's best hopes for sentence relief lie with the convening authority in the essentially unfettered exercise of his clemency powers. *United States v. Coulter,* 3 USCMA 657, 14 CMR 75, 78 (1954). In *Olano,* this Honorable Court suggested that there may be a "special category of forfeited errors that can be corrected regardless of their effect on the outcome" and that a prejudice analysis may be inapposite where such "substantial rights" are concerned. *Olano,* 113 S.Ct. at 1778. The petitioner submits that his right to have an impartial review of his case by a legal officer unconnected with the controversy of his case is such a substantial right for the military accused that plain error should be recognized even absent a determination of prejudice. Allowing a legal officer who testified for the prosecution as to a contested matter *and* injected himself into the proceedings to argue a position for the government, to later conduct a statutorily required impartial review of the petitioner's case is obvious error affecting a substantial right of the petitioner. As such, it is plain error even if prejudice were not so apparent.

## CONCLUSION

When delineating the authority of the federal courts of appeals to correct plain error, this Honorable Court held that

federal civilian courts have the ability to order correction where plain error is found, but are not required to do so. *Olano,* 113 S.Ct. at 1778. However, the discretion to correct plain error is not unfettered and this Honorable Court ruled that such error should be corrected when it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.,* at 1779 *quoting United States v. Atkinson,* 297 U.S. 157, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). Assuming the same principles guide in the military jurisdiction, the military appellate courts abused their discretion by failing to order correction of the errors described above which obviously and seriously impact the fairness, integrity and public reputation of the military justice system.

WHEREFORE, petitioner requests that this writ be granted.

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee

v.

David R. COCHRAN (232–94–9560), Appellant

USCA Dkt. No. 96–1015/AF
Crim.App. No. 30714

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court this 28th day of October, 1996,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (VAUGHT)
Appellate Government Counsel (BRESLIN)

## APPENDIX B

UNITED STATES

v.

COCHRAN, (AFCCA 1996)

UNITED STATES

v.

Sergeant David R. COCHRAN, FR232–94–9560
United States Air Force

***COURT***

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS ACM 30714 29 April 1996

***Synopsis***

Sentence adjudged 9 January 1993 by GCM convened at Edwards Air Force Base, California.

Military Judge: Robert E. Kaszczuk.

Approved sentence: Dishonorable discharge, confinement for life, total forfeitures of all pay and allowances, and reduction to E–1.

***Attorneys***

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain Robert E. Watson.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Lieutenant Colonel Thomas E. Schlegel, Lieutenant Colonel Mark C. Ramsey, and Major John H. Kongable.

***JUDGE***

Before DIXON, SCHREIER, and STARR Appellate Military Judges OPINION OF THE COURT

***Text of the decision***

DIXON, Chief Judge:

Contrary to his pleas, appellant was convicted of rape, sodomy, committing indecent acts and desertion. At a trial by members, he was sentenced to a dishonorable discharge, confinement for life, total forfeiture of all pay and allowances, and reduction to the grade of E–1. The convening authority approved the sentence as adjudged. Appellant assigns four errors upon appeal. Having considered each of the assigned errors, we find merit only in his claim that the sentence is inappropriately severe. We affirm the findings but reduce his approved sentence pursuant to our authority under Article 66, UCMJ.

Three of the assignments of error are decided adversely to the appellant. We reject appellant's assertion that the record of trial is not substantially verbatim. The issue, which appellant raised, is whether the omission of defense counsel's objection and argument on the admissibility of prosecution exhibit 4 (AF Form 2098, Duty Status Change) prevents the transcript from being considered a substantially verbatim record. Prosecution exhibit 4 was offered as evidence that appellant's duty status was changed from "present for duty" to "absent without leave" at 0730 hours on 8 September 1992. Defense counsel argued that the witness, who identified the form, had no personal knowledge concerning the truth and accuracy of the information contained therein. The military judge overruled the objection and admitted the form as a business document. The appellant asserts the absence of a verbatim record because the actual objection by defense

counsel was not reflected in the transcript.

Article 54(c)(1), UCMJ, requires a complete record of the proceedings and testimony in each general court–martial in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court–martial. Obviously, a complete record of appellant's court–martial was necessary in view of the adjudged sentence. An omission in the trial transcript does not affect its characterization as a complete record unless the omission is "substantial." United States v. Lashley, 14 M.J. 7 (C.M.A. 1982); United States v. McCullah, 11 M.J. 234 (C.M.A. 1981).

In this case, we need not concern ourselves with whether the omission was or was not "substantial." The Court has granted a government motion to submit a Certificate of Correction signed by Lieutenant Colonel Robert B. Kaszczuk, the military judge. R.C.M. 1104(d)(2). The Certificate of Correction removes any mystery relative to omissions in the original transcript. All that was found to be missing from the original transcript was the following comment by the trial defense counsel when prosecution exhibit 4 was offered: "Objection your honor. It's hearsay." With the corrected page, we find that the trial transcript is complete.

Next, appellant urges this Court to find that trial counsel committed plain error during his sentencing argument. Trial counsel began his argument by indicating that the appropriate sentence would be a dishonorable discharge, reduction to airman basic, total forfeitures, and confinement for the rest of the accused's natural life. He also stated that the government had the burden of showing the appropriateness of that sentence. To meet that burden, trial counsel proceeded to examine each of the offenses for which appellant was convicted. He stated the maximum authorized confinement for

each specification and suggested how members, acting leniently, should calculate a period of confinement for each offense and thereby accumulate a period of confinement for sixty years. Trial counsel then suggested that such a lengthy term would be equivalent to a life sentence.

We believe the trial counsel's sentencing argument was very misleading and was objectionable on several grounds. His argument suggests that members should reach their sentence through an objective consideration of each individual specification rather than by determining an appropriate unitary sentence. See, United States v. Gutierrez, 11 M.J. 122, 125 (C.M.A. 1981)(Everett, Chief Judge, concurring in the result). Only the military judge should advise the members regarding the maximum authorized punishment for specific offenses. R.C.M. 1005. Finally, trial counsel inappropriately suggests that because of appellant's age a lengthy term of 60 years should be considered the same as confinement for life. While we do not condone this argument, we cannot ignore the fact that it provoked no objections by the defense counsel. Absent plain error, failure to object to improper sentencing argument before the military judge begins to instruct the members constitutes forfeiture of the error. R.C.M. 1001(g); United States v. Shoup, 31 M.J. 819, 821 (A.F.C.M.R. 1990); United States v. Turner, 30 M.J. 1183 (A.F.C.M.R. 1990). We find no plain error.

Appellant also argues that the Staff Judge Advocate, Colonel Linder, was disqualified from preparing the SJA recommendation because of his involvement at the trial. R.C.M. 1106(b) provides:

No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing or convening authority in the same case.

At trial, Colonel Linder was called as a witness for the prosecution. His testimony was limited to explaining why he directed the videotaping of depositions of the victims. He testified that the depositions were taped in order to preserve the testimony since, at the time of the deposition, appellant had deserted. Although the grounds for disqualification under R.C.M. 1106(b) does not include acting as a witness, the discussion after the rule states that a staff judge advocate may also be ineligible to advise the convening authority if he testifies as to a contested issue. We do not find that Colonel Linder testified as to a contested issue and was not disqualified from preparing the SJA recommendation because of his trial testimony. Appellant argues that Colonel Linder was also disqualified because the record of trial reflects that he had voiced strong opposition to continuance of the case.

The only reference to such involvement was a statement which the defense counsel entered on the record after the military judge indicated that the trial date had been set during an R.C.M 802 conference and then asked if either counsel had anything to add. At that point the record of trial reflects the following:

IMC: The only other thing defense would like to add to that, during the 802 conference, that the Staff Judge Advocate, Colonel Linder entered the room and made note of a strong opposition to continuance of the case, because in that discussion with Colonel Linder, that he brought up some issues, however, I don't believe that they would require a disqualification.

MJ: I don't recall the issues, I am not even sure what you are talking about, but if you would like to—

MC: I would just like to put it on the record.

MJ: OK. Would you like to identify the issues or just leave it in a generic—

IMC: Well sir, specifically he discussed extreme opposition to the continuance.

(Machine difficulty, it beeped and the last sentence was repeated by counsel.)

IMC: He discussed having extreme opposition to the continuance based on what he said was, Government expenditure of funds for witness travel at the time and the fact that this trial had been sitting out there, in his words, "for about a year," and that he was upset because "this thing should have gone to trial several months ago, and would have, had not the accused deserted," and I believe those are the words he used. I just want to put it on the record that that communication was made to the military judge. I believe that is not sufficient grounds for a challenge.

MJ: I think from the date, it is pretty obvious that it didn't one way or the other and we are here today, not when he wanted it to go. So there is no challenge based on that?

IMC: No, sir

We need not address whether the foregoing provides a grounds for objecting to the post–trial participation of the Staff Judge Advocate. However, we would be remiss if we left the impression that there is nothing wrong with a staff judge advocate participating in a pre–trial conference held pursuant to R.C.M. 802. R.C.M. 802 permits unrecorded conferences between the military judge and parties to the trial, which includes counsel and the accused. Any concerns a staff judge advocate might wish to convey during such a conference should be communicated through the trial counsel and not by personally attending and advocating the position of the government. Nevertheless, we note this issue was raised for the first time on appeal. With full knowledge of Colonel Linder's involvement in the case, defense counsel raised no objection to the post–trial SJA recommendation. We find the failure to object to the SJA recommendation at the time it was

served on the defense waived any potential error. R.C.M. 1106(f)(6); United States v. Felix, 36 M.J. 903 (A.F.C.M.R. 1993).

In his final assigned error, appellant claims his approved sentence is inappropriately severe. We agree. In doing so, we are cognizant that this is a very aggravated case of child sex abuse involving repeated sexual acts by appellant with his 11–year–old stepdaughter and 6–year–old natural daughter. Appellant stands convicted of rape, sodomy (both anal and oral), and other indecent acts. The abuse continued for more than a year. In addressing the matter of appropriateness of sentence, we do not lose sight of the fact there is perhaps no type of offense more repugnant to our society than sexual abuse involving one's own children. While there is a wide range of sentences which may be considered appropriate in a given case, we believe confinement for life exceeds that limit in this case.

The fact that the approved sentence is within legal limits is insufficient to show the sentence is appropriate. Our mandate under Article 66(c), UCMJ, is to approve only such sentence, or portion thereof, that we find correct in law and fact. A review for sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394 (C.M.A. 1988). In assessing this case for sentence appropriateness, we could find no Air Force case in which a child sex offender has been sentenced to confinement for life. United States v. Ciulla, 29 M.J. 868, 870 (A.F.C.M.R. 1989). United States v. Saul, 26 M.J. 568, 575 (A.F.C.M.R. 1988). As repugnant as this case may be, we are not convinced that it involves offenses so uniquely heinous as to warrant such an unusually harsh sentence. Therefore, we approve only so much of appellant's sentence as extends to a dishonorable discharge, confinement for 40 years, total

forfeiture of all pay and allowances, and reduction to E–1.

Accordingly, the findings of guilty and the sentence, as modified, are AFFIRMED.

Senior Judge SCHREIER and Judge STARR concur.

OFFICIAL

ALVIN J. STRIBLING Technical Sergeant, USAF Chief Court Administrator